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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	

REPLY COMMENTS OF HOME BOX OFFICE AND TURNER BROADCASTING SYSTEM, INC.

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Home Box Office ("HBO") and Turner Broadcasting System, Inc. ("TBS"), by their attorneys and pursuant to Section 1.415 of the Commission's Rules (47 C.F.R. § 1.415), hereby submit these reply comments in response to the Notice of Proposed Rulemaking ("NPRM") released in the above-captioned proceeding on July 10, 1998.[1] In the NPRM, the Commission sought views concerning the responsibilities of cable television operators to retransmit the second digital television ("DTV") service signals of local television broadcasters scheduled to become operational over the next several years, together with information about certain DTV technical compatibility issues. Comments were submitted by a variety of entities including cable operators and programmers, broadcasters, equipment manufacturers and public interest groups.

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1 FCC 98-153, released July 10, 1998.

I. SUMMARY OF POSITION

In the NPRM, the Commission articulated seven possible options for defining cable operators' DTV signal carriage obligations during the transition from analog to digital over-the-air television broadcasting. Comments in response to these options were generally polarized. Cable operators and programmers, together with several public interest groups, favored the "no must carry" option.[2] On the other hand, broadcasters, with certain exceptions, insisted that the Commission had no choice but to adopt the "immediate carriage" option.[3]

As HBO/TBS and several other parties pointed out, nothing in the language or legislative history of Section 614 of the Communications Act of 1934, as amended (the "Act"),[4] which mandates carriage on cable systems of broadcasters' analog signals, extends that mandate to carriage of the new digital signals during the transition period.[5] None of the parties urging the adoption of transitional must carry requirements has articulated successfully the necessary statutory mandate for such action on the part of the Commission. Some of these parties ignore the statutory issue altogether, focusing instead on public policy arguments.[6] Those

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2 See, e.g., Comments of Ameritech New Media; Comments of Discovery Communications, Inc.; Comments of The Media Institute; Comments of the United Church of Christ.

3 See, e.g., Comments of Paxson Communications Corporation. E.W. Scripps Company, which operates nine television broadcast stations, opposes transitional digital must carry. See Comments of Home & Garden Television and Television Food Network. A few other broadcasters favor one of the intermediate options suggested by the Commission. See, e.g., Comments of Pegasus Communications Corporation.

4 47 U.S.C. § 534.

5 In fact, even after the transition, the legislative record reflects nothing other than Congressional neutrality on the subject of DTV must carry.

6 See, e.g., Comments of Chris-Craft/United Group.

parties who do attempt to find a transitional must carry mandate in Section 614 in fact only manage to demonstrate its absence.

Even if the Commission were to determine that it has authority under Section 614 to impose transitional must carry requirements, such requirements would not survive constitutional review. As many parties pointed out, the governmental interests underlying the analog must carry requirements of Section 614 were the subject of exhaustive articulation and scrutiny both in Congress and before the Supreme Court.[7] Even so, Section 614 barely survived challenge under the First Amendment. In contrast to the legislative and judicial record developed in support of analog must carry, there is absolutely no factual predicate for finding sufficient governmental interests to justify intrusion on cable operators' and cable programmers' First Amendment rights through transitional must carry. Indeed, almost every aspect of the video distribution industry and technology on which Congress relied in passing Section 614 has since changed. Accordingly, any digital must carry rules promulgated by the Commission pursuant to the NPRM necessarily would fail to pass constitutional muster under the analysis used by the Supreme Court to sustain the analog must carry provisions.

II. THE COMMISSION IS NEITHER COMPELLED NOR PERMITTED BY SECTION 614 OF THE ACT TO ADOPT TRANSITIONAL DIGITAL MUST CARRY RULES

A. Section 614(b)(4)(B) Is The Only Provision Of The Must Carry Statute That Refers To Digital Television

In their initial comments, HBO/TBS noted that Section 614(b)(4)(B) is the only provision of the must carry statute that refers to digital television, and therefore the only provision governing the extent of a cable system's obligation to

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7 See, e.g., Comments of Time Warner Cable at 15.

carry such signals.[8] HBO/TBS also demonstrated that nothing in the text or legislative history of Section 614(b)(4)(B) mandates transitional digital must carry.[9] The plain language of that section speaks only to an eventual Commission proceeding to ensure the maintenance of carriage of local television stations which "*have been changed* to conform to the modified [i.e., digital] standards."[10] Congress' specific use of the past tense in 614(b)(4)(B), despite its awareness that the Commission was contemplating an overlap transition scheme,[11] plainly demonstrates that it considered the issue of mandatory carriage of advanced television signals not to be relevant until analog signals were no longer available, i.e., after the transition period.[12]

Several other parties make compelling showings regarding the application of Section 614(b)(4)(B) to the post-transition world only, focusing on the plain past-

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8 Comments of HBO/TBS at 7-9.

9 Id.

10 47 U.S.C. § 534(b)(4)(B) (emphasis added).

11 See Comments of Cable Telecommunications Association at 12. As early as 1990, the Commission had made clear its plan to abandon its initial proposal to augment existing NTSC allotments with additional spectrum, and instead to allocate separate DTV channels. In the Matter of Advanced Television Systems and Their Impact on The Existing Television Broadcast Services, First Report & Order, MM Docket No. 87-268, 5 FCC Rcd 5627 (1991).

12 Congress has not disturbed this understanding in its subsequent consideration of digital television transmission. See Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (1996); Balanced Budget Act of 1997, Pub L. No. 105-33, 111 Stat. 251 (1997). In neither instance did Congress, aware of the Commission's transition scheme, in any way amend Section 614 to encompass carriage of dual signals during the overlap period. In fact, in the legislative history of Section 336 of the Act, Congress specifically restated that the issue of mandatory carriage of broadcasters' primary digital signals would be subject only to Commission implementation of Section 614(b)(4)(B). See Telecommunications Act of 1996, Conference Report, 104th Cong., 2d. Sess., Report 104-230 at 171 (1996).

tense wording of the statute.[13] The National Cable Television Association ("NCTA") in particular also points out that the word "change" as used in that Section must be understood to mean "exchange" or "substitution," specifically, the exchange of analog for digital signals.[14] Only after this exchange *has occurred* is the Commission's obligation to ensure carriage of digital signals triggered. Had Congress intended to mandate dual signal carriage, it would not have inserted this triggering language into Section 614(b)(4)(B). Id.

B. No Other Provision of Section 614 Requires Transitional Digital Must Carry

Perhaps sensing that Section 614(b)(4)(B) in itself does not mandate transitional digital must carry, several major broadcasters led by the National Association of Broadcasters ("NAB") argue that such carriage is required by other parts of Section 614, even though they make no reference to digital service.[15] These parties are mistaken.

1. Section 614 Contemplates Carriage of One Signal Per Station

NAB hinges its primary argument on its reading of Sections 614(b)(1)(B) and 614(h)(1)(A). Section 614(b)(1)(B) states that "a cable operator of a cable

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13 See, e.g., Comments of MediaOne Group, Inc., at 26; Comments of Tele-Communications, Inc., at 17; Comments of Ameritech at 5; Comments of Time Warner Cable at 31.

14 Comments of NCTA at 9.

15 See, e.g., Comments of Lee Enterprises, Incorporated; Comments of Schockley Communications Corporation. Each of these parties stated its support for the arguments made by the National Association of Broadcasters, and incorporated those arguments into its own comments by reference. See also Comments of Association for Maximum Service Television, Inc. ("MSTV").

system....shall carry the signals of local commercial television stations."[16] A "local commercial television station" is defined in Section 614(h)(1)(A) as

> ...any full power television broadcast station...licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system. 47 U.S.C. § 534(h)(1)(A).

In its effort to shoehorn a transitional must carry requirement into the plain language of Section 614, NAB argues that Section 614(b)(1)(B) applies, "without distinction, to every local commercial television *signal* 'licensed and operating on a channel regularly assigned to its community by the Commission.'" NAB at 2 (emphasis added). NAB claims that there are no distinctions, exclusions or exceptions to the clear language of this mandate and therefore that cable systems have no choice but to carry "all local commercial broadcast signals...even during the transition period when local commercial stations will be broadcast[ing] both NTSC and DTV signals." NAB at 5.

NAB's position has no merit because it ignores the fact that the carriage requirement of Section 614 is limited to one signal per station. First, the plain language of the statute only refers to multiple signals when speaking of multiple stations. For instance,

> Section 614(a): "Each cable operator shall carry...the *signals* of local commercial television *stations*...as provided by this section."
>
> Section 614(b)(1)(A): "A cable operator of a cable system with 12 or fewer usable activated channels shall carry the *signals* of at least three local commercial *stations*..."

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16 47 U.S.C. § 534(b)(1)(B).

> Section 614(b)(2): "Whenever the number of local commercial television *stations* exceeds the maximum number of *signals* a cable system is required to carry..."

A similar consistency occurs when these terms are used in the singular.

> Section 614(b)(5): "Notwithstanding paragraph (1), a cable operator shall not be required to carry the *signal* of any local commercial broadcast television *station*...."
>
> Section 614(h)(1)(B)(ii): "a television broadcast *station* that would be considered a distant *signal* under Section 111 of Title 17, United States Code...."

(emphasis added)

This pattern of equating a single signal with a single station is repeated throughout the rest of the section.[17]

Second, as if any doubt could remain, the statute specifically *declines* to require cable systems to carry more than one video signal generated by a single broadcast station. Section 614(b)(3)(A) only mandates that a cable operator "carry in its entirety...the *primary video*, accompanying audio and line 21 closed caption transmissions of each...local commercial television [station]."[18] NAB fails to explain why this clear statutory limitation should be ignored by the Commission.[19] Simply put, by carrying the analog signals of the relevant broadcast stations a cable operator fulfills completely its obligations under the must carry statute and the goals of the statute articulated by Congress.

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17 See, e.g., Section 614(b)(1)(B); Section 614(b)(6); Section 614(b)(10)(C).

18 47 U.S.C. §534(b)(3)(A) (emphasis added).

19 MSTV goes even farther, devoting considerable energy to its proposal to tailor the technical requirements of Section 614(b)(3)(A) to the digital format without explaining how a single broadcast station could have two primary signals, one analog and one digital. Comments of MSTV at 26.

In short, there is no evidence in the language of Section 614 to even suggest that Congress contemplated mandatory cable carriage of multiple signals transmitted by the same television station. Thus, there is absolutely no statutory basis for NAB's argument that both a station's analog and DTV signals must be carried during the transition period.

2. Digital Signal Does Not Constitute A Separate Station Qualified For Cable Carriage

While NAB argues that Section 614 mandates cable carriage of multiple signals from the same television station during the transition period, it also suggests that digital service is *not* a second signal of a television station but, instead, constitutes a separate stand alone television station. Borrowing the statutory definition of a "local commercial television station" under Section 614(h)(1)(A), NAB argues that the "new DTV signals of full power television broadcast stations here at issue....*will be licensed and operating on a channel regularly assigned to its [sic] community by the Commission*" and thus are entitled to mandatory carriage. NAB at 4 (emphasis in original). The only inference to be drawn from this statement is that NAB equates the new digital signals with "local commercial television stations" required to be carried on cable systems by virtue of Sections 614(b)(1)(B) and 614(h)(1)(A).[20] As discussed below, NAB is wrong.[21]

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20 The legal analysis of Section 614 accompanying NAB's comments in fact asserts that the DTV signal does *not* constitute a second station in its own right. Comments of NAB at Appendix A - Comments of Jenner & Block. However, NAB's employment of the statutory definition of a local commercial television station in its argument concerning the nature of the DTV signal must be taken at face value.

21 But NAB is not alone. Sinclair Broadcasting Group specifically states that the digital signal constitutes a second station for purposes of Section 614. Comments of Sinclair Broadcasting Group at 5.

a. Second Digital Signal Is Not A "Station" Under Section 614(h)(1)(A)

Section 614(b)(1)(B) mandates the carriage of qualified "local commercial television stations" as defined by Section 614(h)(1)(A). In order to qualify as a local commercial television station under the statute, a station must be "licensed" and operating on a channel "regularly assigned" to its community by the Commission. There is nothing "regular" about the DTV channel assignments made by the Commission. First, the method by which the Commission assigned the digital channels was completely outside the "regular" procedure for establishing broadcast allocations. Second, the digital allocations are only temporary in nature. Moreover, the DTV channels are not separately "licensed" by the Commission. Rather, each broadcaster's transitional digital authorization will consist of nothing but a temporary modification of an existing license.

In the Sixth Report & Order implementing the DTV transition the Commission spelled out its plan for establishment of a temporary digital allocation table.[22] Each existing broadcast licensee would be assigned a temporary channel on which to construct and begin operating digital facilities during the transition period. In the Fifth Report & Order, the Commission established the method by which these allocations would be "offered" to existing broadcast licensees, together with the schedule for filing construction permit applications, completing digital construction, filing applications for digital licenses to cover such construction and commencing digital operations on these channels.[23]

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22 In the Matter of Advanced Television Systems and Their Impact on The Existing Television Broadcast Services, Sixth Report & Order, MM Docket No. 87-268, FCC 97-115 (April 21, 1997).

23 In the Matter of Advanced Television Systems and Their Impact on The Existing Television Broadcast Services, Fifth Report & Order, MM Docket No. 87-268, FCC 97-116 (April 21, 1997).

This elaborate and carefully orchestrated process is well outside the bounds of the Commission's regular processes for assigning television channels to communities. In fact, it appears to be unique in the history of Commission procedure. Normal broadcast allotments are made on the basis of individual petitions for permanent amendment of the Commission's Television Allotment Table.[24] These petitions are subject to both engineering scrutiny and to competing proposals. Once the Commission has approved a new allotment, that channel is open to applications from both the petitioning party as well as other interested parties.[25] Here, the Commission has manufactured a new nationwide table in a single step.[26] Eligibility for each of the new channels is not open, but is confined to one specific current broadcast licensee.[27] Further, the schedules for filing applications for appropriate authority to construct and operate facilities using these channels have been arbitrarily established at variance from those regularly employed in connection with broadcast facilities.[28] The Commission repeatedly has stated that this procedure is necessary in order to foster the successful conversion of the broadcast system from analog to digital.[29] While the Commission's goals may be worthy, the methods it has chosen in order to achieve them are far from the regular channel assignment procedures envisioned by Congress when it established

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24 See 47 C.F.R. § 73.606.

25 See 47 C.F.R. § 73.607.

26 See 47 C.F.R. § 73.622.

27 See 47 C.F.R. § 73.624(a).

28 See 47 C.F.R § 73.624(d), (e).

29 See, e.g., Fifth Report & Order, MM Docket No. 87-268 at ¶¶ 61-93.

the definition of qualifying local commercial television stations under Section 614(h)(1)(A).

The lack of regularity of the digital channel assignments is further emphasized by their temporary nature.[30] Section 76.5(b) of the Commission's rules defines a television station as "any television broadcast station operating on a channel regularly assigned to its community by Section 73.606 of this chapter..."[31] Section 73.606, in turn, provides the table of analog channels regularly assigned to listed communities. However, 73.606 contains no reference to digital channel allocations. Rather, the digital allocations are set forth instead in Section 73.622. That section on its face states that "[t]he initial DTV allotment table was established on April 3, 1997, to provide a second channel for DTV service for all eligible analog television broadcasters."[32] Thus, the Commission's own rules make explicit the temporary nature of the DTV table of allotments, separating it from those analog channels regularly assigned under Section 73.606. Indeed, one of the conditions of the Commission's consent to a broadcaster's initiation of digital operations is the requirement that either the additional channel or the original channel held by the licensee must be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulations.[33] The Commission already has put all parties involved on notice that all permanent

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30 NAB recognizes the temporary nature of the transitional digital assignment plan. Comments of NAB at 25. MSTV refers to the transitional digital allotments as "loaners." Comments of MSTV at 7.

31 47 C.F.R. § 76.5(b).

32 47 C.F.R. § 73.622(a).

33 Fifth Report & Order at ¶ 69.

digital allocations "will be fungible," and that the Commission envisions a further round of adjustments to such allocations once the transition period is complete.[34]

Thus, contrary to NAB's suggestion, the transitional DTV facilities do not qualify as "local commercial television stations" because they are not separately "licensed" and they will not operate on channels "regularly assigned" to their communities.

b. NAB's Other Arguments Undercut Its Must Carry Approach

NAB further contradicts itself when it tries to wriggle free of the provisions of Section 614(b)(5) which relieve a cable operator of the obligation "to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station."[35] In arguing that duplicative programming on analog and digital channels does not fall within this exemption, NAB claims that the "Act [...] forbids the conclusion that a single television station broadcasting an analog signal becomes 'another' station simply by adding a digital signal."[36] But if NAB is correct here - that separate analog and digital signals are part of a *single* television station - then how can the station be entitled to *separate additional* carriage of a digital signal "licensed and operating on a channel regularly assigned to its community" as NAB elsewhere suggests?[37]

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34 Memorandum Opinion & Order on Reconsideration of Fifth Report & Order, MM Docket No. 87-268, FCC 98-23 (February 23, 1998) at ¶ 16.

35 47 U.S.C. § 534(b)(5).

36 See NAB at Appendix A, Comments of Jenner & Block at 2-3. Sinclair attempts to get around this conundrum by arguing that the difference between digital and analog formats is sufficient to make the signals nonduplicative of each other. Comments of Sinclair at 5.

37 Other sections of the NAB comments also reflect its self- contradictory position. For example, while on page 3 of Appendix A, the analysis

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Virtually all parties to this proceeding agree that the only reference to digital television in Section 614 is found in 614(b)(4)(B). A plain reading of that section indicates Congress' intent that conversion of a broadcast station from analog to digital transmission should not disrupt cable carriage of that signal once it *has been changed*. Attempts by NAB and other broadcast parties to find justification for additional digital must carry requirements in the other provisions of Section 614 fail. No other provision of Section 614 supports such a finding. Had Congress intended to require dual transitional must carry, it would have crafted Section 614 to reflect that intent, or at least taken advantage of the several opportunities it has had since 1992 to include a transitional must carry provision in amendments to the Act. Congress has not chosen to act. Therefore, as it stands, Section 614 does not mandate or permit dual transitional must carry.

III. TRANSITIONAL DIGITAL MUST CARRY RULES WOULD NOT BE SUSTAINED UNDER THE TURNER DECISIONS

Even if the Commission were to conclude that Section 614 does authorize it to consider adoption of digital must carry rules during the transition period, such rules would not be consistent with the narrow premises under which the Supreme Court sanctioned analog must carry. As HBO/TBS and many other parties noted in their initial comments,[38] the Court's conclusions in Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622 (1994) ("Turner I"), and Turner Broadcasting System, Inc. v.

Continued from previous page

emphatically states that second digital signals do not constitute independent stations, on page 22 it states that during the transition "twice as many stations [will be] eligible for mandatory carriage."

38 Comments of HBO/TBS at 10 et seq. See also Comments of Tele-Communications, Inc.; Comments of NCTA.

FCC, 117 S. Ct. 1174 (1997) ("Turner II"), that analog must carry is constitutional were based on a very specific set of findings concerning both the government interests at stake and the circumstances justifying imposition of analog must carry in pursuit of those interests. The transitional digital must carry rules proposed in the instant NPRM and urged in the broadcasters' comments fall well outside the scope of the Supreme Court's conclusions and therefore would not survive constitutional scrutiny.

A. No Evidence That Transitional Digital Must Carry Would Further Government Interests Underlying Turner Decisions

As an initial matter, it is not the case, as claimed by NAB, that the findings Congress made more than six years ago with respect to analog must carry are essentially res judicata with respect to digital must carry, especially during the transition period.[39] Neither Congress nor the Commission made any findings regarding a nexus between transitional digital must carry and the government interests underlying the analog must carry requirements. Moreover, the findings that were made with respect to analog have been eclipsed by rapid change in the business and technological environment of the television industry. If the Commission were to attempt to build a record to justify transitional digital must carry as a legitimate extension of the current requirements in order to support the government interests identified in Turner I & II, it would be compelled to examine the conditions as they exist today and not simply default to the facts relied on in 1992.[40]

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39 Comments of NAB at 43.

40 As Time Warner Cable points out, any such findings with respect to digital must carry requirements made by the Commission at this point would be purely speculative and would serve as a dubious basis on which to build an

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For example, the analysis conducted by the Supreme Court in the Turner cases does not take into account the economic model of DTV broadcasting. Congress in 1992, and the Supreme Court in Turner, applied an economic model for television broadcasting based on a single video channel supported by advertisers. That analysis is irrelevant to DTV given the Commission's rules which grant maximum flexibility to broadcasters to utilize their digital spectrum for multiple video, audio and data services, both advertiser and subscription based. Second, the rapid development of alternative forms of multichannel video programming distribution has reduced the ability of cable systems to act as programming bottlenecks, a key ingredient in the Turner decisions. Third, the Turner analysis does not take into account the proliferation of over-the-air antennas, improved A/B switches and other technological and regulatory advances which have greatly enhanced over-the-air reception capabilities. Finally, the nature of the harm from must carry perceived by the Turner Court was more benign than would exist in today's environment if must carry obligations were doubled as the broadcasters propose.[41] In short, the factual basis which predicated the argument that analog must carry regulations were both necessary and sufficiently narrowly tailored to achieve the substantial government interests identified in Turner I & II is meaningless in the digital context.

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argument supporting their constitutionality under Turner I & II. Comments of Timer Warner Cable at 21.

41 The Supreme Court in Turner II found the imposition of analog must carry to be a "modest" burden because cable systems already were carrying voluntarily most local broadcast stations that qualified for carriage under the new regulations and that the "vast majority" of those stations would continue to be carried even without imposition of those regulations. Turner II, 117 S.Ct. at 1198. See also Comments of NCTA at 29.

B. Rapid Digital Transition Is Not Among The Government Interests Supporting The Turner Decisions

NAB and other broadcasters also argue that an additional substantial government interest supporting transitional digital carriage under Section 614 is "furthering the transition away from analog broadcasting and the recovery of spectrum used for analog television so that it can be auctioned for other purposes, stimulating new economic activity and providing additional revenues to the Government."[42] However, this interest was never considered or articulated by Congress in connection with implementation of Section 614, and therefore is not among those interests identified in the Turner cases as justifying imposition of must carry requirements under the statute. In fact, as Time Warner Cable, TCI and others have noted, there is no indication at this point that the government even *has* identified its interest in requiring digital transitional carriage.[43] Thus, there simply is no basis for NAB's assertion.

Moreover, even if ensuring a rapid digital transition eventually were held by the Courts to be a sufficiently important government interest, it is not at all evident that digital transitional must carry would be necessary to further that objective. As HBO/TBS and others have shown, regulatory and technical changes are underway with regard to the use of over-the-air antennas and A/B switches.[44] Such changes could reduce significantly the need for broadcast stations to rely on cable systems

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42 Comments of NAB at 43.

43 Comments of Time Warner Cable at 14; Comments of TCI at 13.

44 See Comments of Time Warner Cable at Exhibit B (discussion of advances in input-selector switch technology), Exhibits C & D (DBS development of customized over-the-air antennae for use in conjunction with satellite-based program distribution). See also "Antennae Attract Viewers to Satellite TV," Wall Street Journal, Vol. CCXXXII, No. 107, December 1, 1998 at B1.

for delivery of their signals. Further, many parties have noted the ongoing market-driven negotiations between cable operators and broadcasters regarding voluntary digital carriage agreements.[45] In light of these and other factors, it cannot be concluded that digital must carry is necessary in order to ensure a rapid digital transition.

In fact, digital must carry could just as easily delay the transition. HBO/TBS agree with broadcasters that the availability of quality digital programming is necessary to entice consumers to purchase digital television sets in the great quantities necessary to make the transition to digital successful. But by no means do broadcast stations hold the monopoly on such programming. Indeed, the comments submitted in this proceeding would suggest that the opposite is true - that much of the best quality digital programming in the near future will be available from non-broadcast programmers. HBO/TBS spelled out their own efforts to date to bring such programming to consumers. Other cable programmers submitted equally ambitious plans and proposals, all of which are likely to encourage consumers to make the switch to digital.[46] However, if these non-broadcast digital programmers are deprived of carriage because broadcasters have priority irrespective of the quality of their programming, the overall quality of

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45 See, e.g., Comments of Ameritech New Media, Inc., at 15; Comments of MediaOne Group, Inc., at 7. See also "Time Warner Inc., Agrees To Carry CBS's Digital TV," Wall Street Journal, Vol. CCXXXII, No. 113, December 9, 1998 at B6.

46 See, e.g., Comments of Discovery Communications, Inc.; Comments of Lifetime Entertainment Services, Inc., at 16.

digital programming available to consumers would be diminished and the transition delayed. [47]

IV. THE COMMISSION SHOULD MONITOR THE INDUSTRY PROGRESS TOWARD DEVELOPMENT OF COPY PROTECTION STANDARDS

In their initial Comments, HBO/TBS noted the importance of rapid development and implementation of standards for copy protection in the digital transmission environment. Because of legitimate concerns by owners of copyrighted materials that digital duplication could lead to new and higher levels of product piracy, it is essential that copy protection be provided so that compelling programming will be licensed to program distributors. HBO/TBS continue to believe that appropriate copy protection standards will be developed by cooperation among the affected industries.[48] However, there is some concern on the part of HBO/TBS that the standard-setting process for copy protection is not progressing as rapidly as other standards and issues (i.e., IEEE 1394 interface). It would be advantageous for the FCC to carefully monitor the development of the copy protection standards and to encourage the relevant industries to reach a consensus on the standards if the process appears to be in jeopardy.

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47 The adverse effect would not be confined to those programmers who already offer digital programs. Many comments were submitted by cable systems and programmers expressing the fear that their current analog programming services would be squeezed out by imposition of digital must carry. See, e.g., Comments of BET Holdings II, Inc.; Comments of A&E Television Networks; Comments of the C-Span Networks; Comments of Ameritech New Media, Inc. Without the ability to establish themselves in the analog market, these parties will have little ability or incentive to undertake provision of digital versions of their services.

48 HBO/TBS believe that any such standard should include so-called "copy once" capability.

V. CONCLUSION

Imposition of must carry requirements for digital television broadcast signals during the transition period would not be consistent with Section 614 of the Act or the United States Constitution. Therefore, the only FCC must carry proposal that could be implemented legally, and that is most consistent with the public interest, is the proposal not to impose DTV must carry requirements. None of the comments submitted in favor of any other form of implementation provides sufficient justification to alter this conclusion.

Respectfully submitted,

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December 22, 1998

CERTIFICATE OF SERVICE

I, Rebecca S. Catelinet, a secretary with the law firm Reed Smith Shaw & McClay LLP, hereby certify that on the 22nd day of December 1998, I have caused to be delivered the foregoing **"REPLY COMMENTS OF HOME BOX OFFICE AND TURNER BROADCASTING SYSTEM, INC."** by first class mail, postage prepaid, to the following persons:

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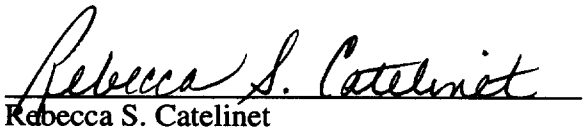

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